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Supreme Court of the United States

OCTOBER TERM, 1941

No. ~~506~~ 3

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY,

Petitioner,

vs.

W. V. N. POWELSON, ASSIGNEE AND SUCCESSOR IN INTEREST OF SOUTHERN STATES POWER COMPANY, A CORPORATION, *et al.*,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

REJOINDER BRIEF FOR RESPONDENT.

ARTHUR T. VANDERBILT,
GEORGE LYLE JONES,
GEORGE H. WRIGHT,
Attorneys for Respondent.

On Brief:
WILLARD G. WOELPER,
G. DIXON SPEAKMAN,
JAMES HUNTER, III.

March, 1942.

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REJOINDER BRIEF FOR RESPONDENT.*

I.

Petitioner devotes the first portions of both its Reply Brief and its Supplemental Brief to a restatement of its

* At the time of the oral argument Respondent was unaware of the filing by Petitioner of its Reply Brief. Copies of the Reply Brief were mailed by Petitioner to Respondent's attorney in Newark the evening before the argument, after counsel had left for Washington.

At the conclusion of the argument Petitioner was granted leave to file a Reply Brief. This second reply brief is designated a Supplemental Brief.

By leave of Court, this Rejoinder Brief is filed directed to both the Reply Brief and the Supplemental Brief.

position with reference to the applicability of the principles of *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, (1913), to this case (Pet. Rep. Br. 1-9; Supp. Br. 1-6).

Petitioner casually disposes of the many authorities referred to by Respondent in its historical analysis (Resp. Br. 28), which establish that, under the common law in general and of North Carolina in particular, the use of the water in a non-navigable stream for power purposes is a property right. It suggests that these cases refer merely to property rights in the fast land and the land underlying the river, but this is contrary to all the authorities, for, as these cases clearly indicate, the use of the water itself is a property right. (See for example *Swain* v. *Pemigewasset Power Co.*, 76 N. H. 498 (Sup. Ct. N. H. 1912) (quoted Resp. Br. 25, 26); *Nantahala Power & Light Co.* v. *Moss*, 17 S. E. 2d (Adv. Op.) 10 (Sup. Ct. N. C. 1941).

Petitioner now frankly admits that "we do not challenge his [Respondent's] title in this proceeding" and concedes *arguendo* that *"he had such indefeasible title to the property as it is possible for any private person to have"** (Pet. Reply Br. 2). It is therefore apparent that Petitioner's contention comes to this: although Respondent has complete property rights in the use of the water for power purposes as against all other persons, such property rights cannot exist as against the Federal Government, because of the Government's plenary power over navigation.

Petitioner continues to ignore the fact that the Government has many plenary powers under the Constitution which enable it to obtain private property, but which in every

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* All italics ours, unless otherwise indicated.

case require just compensation for such taking. Thus the Government may take land for an army encampment or for its capitol buildings, but just compensation must be paid. The same principle is applicable where Petitioner seizes valuable water power rights.

As to the *Chandler-Dunbar* Case.

Petitioner stresses the holding of this Court in *United States* v. *Chandler-Dunbar Company*, 229 U. S. 53 (1913), which it contends recognizes that a landowner's property rights may exist in navigable waters as against other persons, but not as against the Government. Petitioner continues to ignore the fact that this decision (and for that matter, many other decisions of this Court) holds, under long established principles of common law, that the flow of water in *navigable* streams is not subject to private ownership. (See Resp. Br. 18-20.) This case largely turns upon the point that our Federal Government has succeeded to the rights held by the sovereign at common law with reference to navigable waters. Obviously, when the Government abates the use of structures in *navigable* waters, it is not depriving a landowner of any property rights in the flow of such waters. This principle can have no application, however, to *non-navigable* waters, where equally long established principles of common law recognize the existence of property rights in the flow of the water (Resp. Br. 28).

An examination of the opinion in the *Chandler-Dunbar* case indicates that the reasoning of this Court did not disregard the clear distinction between property rights in waters above and below the head of navigation. The Court there stated specifically (229 U. S. 69):

> "*Ownership of a private stream wholly upon the lands of an individual is conceivable;* but that the running water in a great navigable stream is capable of private ownership is inconceivable.
>
> "Whatever substantial private property rights exist in the flow of the stream must come from some right which that company has to construct and maintain such works in the river, such as dams, walls, dykes, etc., essential to the utilization of the power of the stream for commercial purposes. *We may put out of view altogether the class of cases which deal with the right of riparian owners upon a non-navigable stream to the use and enjoyment of the stream and its waters.* The use of the fall of such a stream for the production of power may be a reasonable use consistent with the rights of those above and below. The necessary dam to use the power might completely obstruct the stream but if the effect was not injurious to the property of those above, or to the equal rights of those below, none could complain, since no public interest would be affected."

In view of this enunciation of long accepted common law doctrine, it is manifest that no serious weight can be given to Petitioner's contention that the reasoning of this Court in the *Chandler-Dunbar* case sustains the view that there can be no property rights in the water power of a non-navigable stream.

Finally, it is highly significant that in the *Chandler-Dunbar* case the Court held that compensation must be paid for the value of the lands taken for canal and lock purposes, thereby recognizing that even the plenary power of the Government over *navigable* waters is subject to the limitations of the Fifth Amendment.

As to the *Kelly (Cress)* Case.

In view of all these rules of law, Petitioner's claim that *United States* v. *Kelly*,* 243 U. S. 316 (1917), should be considered overruled by the *Chandler-Dunbar* case is without merit. That case held, as the Solicitor General admitted in his oral argument, that the water power value of a *non-navigable* tributary of a navigable stream was a valuable property right for which compensation must be paid by the Government, even where its destruction was caused by an admittedly valid exercise of constitutional power over navigable streams. The reasoning and holding of the *Chandler-Dunbar* case do not conflict with that decision; on the contrary the two cases are entirely consistent.

Petitioner's attempted factual distinction of the *Kelly (Cress)* case (Pet. Rep. Br. 6) is entirely unsupported in the Record. There can be no doubt that a mill dam will do exactly what it is designed to, *i e.* store waters so that the mill wheel may be turned when the grain is brought in for grinding. Petitioner's assertion that this mill dam would "ordinarily" not affect navigation below (Pet. Reply Br. 6) is pure speculation.

In any event this was not one "of the facts there disclosed" as Petitioner suggests (Rep. Br. 6) to which the *Cress* case is to be limited in the light of the statement in *United States* v. *Chicago, Milwaukee, St. P. & Pac. R. R. Co., et al.*, 312 U. S. 592 (1941), which Petitioner cites (Rep. Br. 3).

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* The companion case considered in the same opinion is United States v. Cress, and Petitioner refers to the Kelly case under that name.

As to the *Chicago, Milwaukee, St. P. & Pac. R. R. Co.* Case.

An examination of the brief filed in this Court by the Government in *United States* v. *Chicago, Milwaukee, St. P. & Pac. R. R. Co., et al.*, 312 U. S. 592 (1941), shows that the land owner contended that its land could not be flooded by the Government for the purpose of improving navigation without payment of just compensation. The Government filed a brief answering the Railroad's contention and distinguishing the *Cress* case as follows (Br. 18):

> "The *Cress* case is not in point because it involved land impressed with no navigation servitude, namely land in the bed of a *non-navigable* tributary and land above high-water mark." (Italics by the Solicitor General.)

In reaching its decision in the *Chicago, Milwaukee, St. P. & Pac. R. R. Co.*, case, *supra*, this Court recognized this argument of the Government as a valid one and held (312 U. S. 597):

> "What was said in the *Cress* case must be confined to the facts there disclosed. In that case the Government's improvement in a navigable stream resulted in the flooding of plaintiff's land in and adjacent to a non-navigable stream. The owners of the land along and under the bed of the stream were held entitled to compensation for the damage to their lands. The question here presented was not discussed in the opinion."

It is apparent, therefore, that when this Court stated that the *Cress* case must be confined to its facts, it was referring to the fact that a *non-navigable* tributary was involved and not that a particular type of dam was constructed thereon, as Petitioner now suggests.

It is submitted that the Government's suggestion that a landowner may have property rights in the water power of a non-navigable stream if he builds a mill dam, but not if he builds a different dam, attempts to draw an artificial and untenable distinction. The existence of a property right in the water power of a stream cannot possibly be made to depend on what the landowner might do or might not do to utilize his property rights.

As to Necessity of a License.

Petitioner argues that the Federal power is such that Respondent could not erect a dam on its property, even though the river is admittedly non-navigable, without the license and consent of the Government (Pet. Sup. Br. 3).

The latest expression of this Court on this point is set forth in *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377 (1941). There the Court was dealing with a stream which it found to be navigable. In that case it was strenuously contended that even if a license could be required, the conditions of such license must be limited to the protection of the navigable capacity of the waters of the United States, and that the Commission's refusal to grant such a license was unlawful. On that point this Court said (311 U. S. 419):

> "*License Provisions:* The determination that the New River is navigable eliminates from this case issues *which may arise only where the river involved is non-navigable.*"

In making this statement this Court referred specifically to the opinion below in the 4th Circuit (107 F. 2d 769 at 793, *et seq.*), where the Circuit Court of Appeals held that

the power of Congress as to non-navigable streams is limited to purposes of preventing adverse effects on navigable streams.

In construing the license provisions of the Federal Water Power Act the Circuit Court of Appeals held (107 Fed. 2nd, 793):

> "The view contended for is that this clause, as a part of the whole section, gives the Commission jurisdiction over dams proposed to be constructed on *non-navigable waters,* irrespective of the effect of the dam on navigable waters of the United States, whenever the Commission finds after investigation that 'the interests of interstate or foreign commerce would be affected by such proposed construction;' • • • We do not think this broad construction of the Act based on the interstate commerce power, to the extent that it is dissociated from navigation, is tenable either on the basis of statutory construction or constitutional authority." (Italics by the Court.)

It is accordingly clear that even though Congress may require a license before a dam can be constructed on a non-navigable stream, nevertheless, this Court has never held that such license may be withheld arbitrarily or granted upon terms other than those reasonably calculated to prevent an adverse effect upon navigation.

As to the Effect on Navigation.

Petitioner has reargued at some length the factual question of the possible effect of the proposed development upon navigation and asserts that Respondent stated at the oral argument "that the contemplated development could have

no adverse effect" on navigation, and that it would have a beneficial effect (Sup. Br. 7-8). Petitioner then asserts that the record directly contradicts this statement. Without attempting to reargue at length this question of evidence which is fully covered in Respondent's Brief, suffice it to say that the Record does disclose that competent evidence was offered by Respondent to show that its contemplated development could have no adverse effect on navigation (Br. 60-68). Although some contrary evidence on the point was offered by Petitioner, the findings of the three tribunals below established that Respondent's property could have been developed as a valuable hydroelectric project without any adverse effect on navigation.

Petitioner argues that if it shows that one of several possible methods of operation would have had an adverse effect, the plenary power of the Government is established (Supp. Br. 8). Counsel for Respondent did not attempt to advise the Court as to the methods of operation which might be used by other persons at the sites in question. *The only question that can properly be raised is what operations were in fact contemplated.* Again, Petitioner suggests that Respondent's property right depends not on what he would do with it, but on what some "expert" says might be done with it.

Without citation of direct authority and with the aid only of strained analogies, Petitioner seeks to attach to non-navigable streams the law of navigable streams *without showing any reason or necessity* for altering rules of property law which govern literally hundreds of thousands of titles to lands held by private citizens. In the absence either of authority or of the suggestion of any reason for changing

century-old rules of property law which have been relied upon by citizens in every state, it is respectfully submitted that such a drastic alteration of the law should not be lightly contemplated.

II.

Petitioner in its Supplemental Brief (pp. 9-13) also purports to correct certain alleged misstatements of fact made by Respondent to the Court.

(1) Respondent did deny in oral argument that Mr. Powelson's testimony indicated that his valuation of the property was arrived at by an arbitrary capitalization of predicted income. Although Petitioner alleges that this is a misstatement and that it is contradicted by Mr. Powelson's own testimony, he merely refers this Court to pages 361 to 363 of the Record. The only portion of this testimony of Mr. Powelson which even remotely suggests that capitalization might be involved, reads as follows (R. 361):

> "I put up a financial statement in which I showed various items of cost, and in which I showed a surplus. I showed that if there was deducted from the surplus earned 6 per cent of the amount I stated as the value of the property, there would be left about two-thirds or more to that surplus for the new people who might come in.
>
> "Now that surplus would make it attractive for new people to come in; it would make it attractive for power companies themselves to take a part of this financing, to get a part of what I have called the gravy, when I testified before on that subject."

It is apparent that the witness was here explaining why he thought an interested purchaser would find the project commercially attractive. He did refer here to "6 per cent of the amount I stated as the value of the property", but he clearly did not state that he had arrived at that valuation by capitalizing profits at 6%. Indeed, his testimony, and Respondent's Exhibit 282 (offered Comm. Tr. 1470), showed the possibility that the proposed development when completed could earn a net income, subject to Federal taxation, of $1,352,693. If Mr. Powelson had arbitrarily valued his property by capitalizing the profits at 6%, he would have arrived at a figure in excess of $22,500,000. rather than $7,500,000.

We do not need to speculate, however, as to how Mr. Powelson arrived at his valuation of all of the properties of Respondent. That is clearly set forth in the Record (R. 206-214). The gist of the factors he took into account was quoted at the oral argument (R. 206):

> "Q. (Continuing.) Have you estimated the fair market value on January 28, 1936, of the properties of the Southern States Power Company, as they have been here described, in their condition before and after the taking by the Government on that day?
>
> "A. I have.
>
> "Q. And have you taken into consideration all the uses and purposes for which the property is adapted or to which it might reasonably be applied, including the best and most available use to which it could be put?
>
> "A. I have.
>
> "Q. In making that estimate of the fair market value of that property on January 28, 1936, what did you take into account?
>
> "A. I took into account the circumstances that you have just read from the Olson case. I was

familiar with that case. I am familiar with that case and I think I understand the rule which the Supreme Court laid down in that case. *I took into consideration all the circumstances which I believed could be fairly brought forward and which would reasonably be thought to have substantial weight in bargaining between a willing seller and a desirous buyer.*

Those circumstances are numerous. I am prepared to enumerate them for you, if you would like to know what they are."

Respondent's witnesses in arriving at their estimate of value undoubtedly took into consideration the fact that a hydroelectric project could be operated at a profit, but none arrived at his valuation by capitalizing profits. Profits were considered merely as one of many factors which would affect and influence negotiations between a prospective purchaser and the seller.

Not only was testimony on the fact of profits essential to make out Respondent's proof of the commercial value of its lands in the absence of evidence of actual sales between a willing buyer and a willing seller, but counsel for Petitioner insisted at the hearing before the Commissioners on proof of profits (Comm. Tr. 2041):

"MR. FOWLER: May it please the Commission, maybe I did not make it plain, that if this respondent simply proved that these lands are adaptable to water power construction, that is, the building of dams, that he has gone only the first step. *He has got to show that they are adaptable at a profit.*"*

The same demand for proof that the property could be profitably developed was repeated by Petitioner's counsel (Comm. Tr. 2301; reproduced at R. 393):

* Quoted at the oral argument. Respondent's counsel was directed by the Court to have this excerpt printed and submitted to the Court.

> "MR. FOWLER: *The burden rests upon the respondent to show this Commission that this property can be profitably developed.*"*

2. Petitioner says that Respondent stated to the Court that Respondent had spent over a million dollars "in acquiring lands and land rights" (Pet. Supp. Br. 10).

Counsel for Respondent did say to the Court that Respondent had invested $1,061,942.52 in this enterprise, of which Mr. Powelson personally contributed $586,196.21 (R. 185), and that this money was used *for buying lands, surveying, engineering, taxes, acquisition costs, legal expenses,* etc., and that not a penny of it was paid as compensation for the owners or officers by way of salary, dividends or otherwise. At this point he was paraphrasing page 5 of Respondent's brief, where these facts and figures are summarized. At the same place Respondent refers to its Exhibit 187 (offered Comm. Tr. 721) which states in detail the specific amounts which go to make up the total sum invested in this enterprise.

3. Petitioner now suggests that the inference of Respondent that Petitioner's Exhibit O, appearing on page 1042 of the Record, purported to show that the value of Respondent's lands was some $600,000., is a clear misuse of this Exhibit (Pet. Supp. Br. 11). Petitioner also notes that this Exhibit is printed out of place in the Record. The Record was, of course, prepared and printed by Petitioner and it is instructive to consider the index thereof in which the Petitioner describes this Exhibit as "Petitioner's Ex-

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* Quoted at the oral argument. Respondent's counsel was directed by the Court to have this excerpt printed and submitted to the Court.

hibit O—*Value of Southern States Power Co. lands as computed by Witness Sayford,* table 5-A." This exhibit was offered and accepted in evidence without any limitation being placed thereon as to its use (Dis. Ct. Tr. 428):

> "Q. Was this table prepared by you?
> "A. It was.
> "Q. Does that correctly represent what it purports to represent?
> "A. It does.
> "MR. FITTS: I offer the table referred to in evidence as Petitioner's Court Exhibit O.
>
> (Whereupon the document above referred to was marked Petitioners Court Exhibit O in evidence.)"

Whatever the purpose of Petitioner may have been in introducing this testimony and exhibit in evidence, the fact remains that it was offered to influence the District Court to reduce the award made by the three Commissioners. Petitioner cannot now disclaim the responsibility for the testimony of its own witness, head of the Maps and Surveys Division of the TVA.

Petitioner reargues its position that evidence as to prices paid for other lands by the Government was brought into the case over its opposition (Pet. Supp. Br. 13). Respondent has shown in its main brief that in the first place this evidence was introduced by Petitioner itself, and in the second place that it was not introduced at the insistence of the Commissioners (Br. 85-87).

Petitioner states that prices paid by a condemnor are never admissible in eminent domain proceedings, because they are in the nature of compromises (Pet. Supp. Br. 13).

Passing for the moment the fact that Petitioner introduced this evidence itself and therefore cannot object to its consideration, it should be noted that Petitioner's own witness Snyder testified that it was the practice of the TVA to appoint an appraisal committee to inspect all properties desired and fix the prices at which the land was to be purchased. He stated (R. 642):

> "We follow the policy of doing no trading. In other words we purchase at that price, neither above, nor below, and if we are unable to purchase we ultimately go into condemnation."

In view of this practice of the TVA the price which it paid for other lands in voluntary negotiations is highly evidential.

There is no indication in any of the findings of the three tribunals below that they arrived at their estimates of value by using percentages, but it was referred to merely as illustrative that the valuation decided upon was not unreasonable.

The Circuit Court of Appeals said (R. 1077):

> "In view of these prices actually paid by petitioner at or around the time of condemnation, the value fixed by the court upon the lands condemned does not appear to be excessive * * * the availability of the land for power purposes constituted its chief element of value as a whole, and it was for such purpose that it was being acquired. If a purchaser felt justified in expending $555,531.00 for lands to provide approximately one-fifth of the basin of the reservoir, it would not seem unreasonable to place a value of $976,289.40 upon lands which would

> provide not only the remainder of the basin, but also the dam site necessary to the development. Particularly is this true where the lands and dam site were held by a corporation which had acquired them for the purpose of the development, which enjoyed the right of eminent domain for that purpose and which had been adjudged to have priority of right with respect to the exercise of that power. Considering these circumstances, the award made respondent seems conservative in comparison with the prices paid for other lands."

It is apparent therefore that percentages were considered by the Court merely as a device for testing the reasonability of an award arrived at independent of such ratios. In any event, Petitioner may not be heard to complain of the rational use by the triers of fact of evidence produced by it, particularly when the exhibit was offered at the second trial of fact before the three-judge District Court with full knowledge of the testimony offered by both sides in the earlier proceeding before the Commissioners. In fact, when Respondent re-offered in evidence in the District Court the entire record before the Commissioners, Petitioner made no objection to the admission of those portions relating to the prices of other lands purchased by TVA (R. 817). He likewise did not include these portions in his

formal motion to strike evidence (R. 802). It is therefore submitted that Petitioner can not now be heard to complain of the use of such evidence by the tribunals below.

Respectfully submitted,

ARTHUR T. VANDERBILT,
GEORGE LYLE JONES,
GEORGE H. WRIGHT,
Attorneys for Respondent.

On Brief:

WILLARD G. WOELPER,
G. DIXON SPEAKMAN,
JAMES HUNTER, III.

March, 1942.